No. 16-1371

In The Supreme Court of the United States

TERRENCE BYRD, PETITIONER,
v.

UNITED STATES OF AMERICA, RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF SOUTHWESTERN LAW STUDENT LINDSEY N. URSUA, AND PROFESSORS NORMAN M. GARLAND AND MICHAEL M. EPSTEIN, IN ASSOCIATION WITH THE AMICUS PROJECT AT SOUTHWESTERN LAW SCHOOL, AS *AMICI CURIAE* IN SUPPORT OF THE PETITIONER

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QUESTION PRESENTED

Whether a driver has a reasonable expectation of privacy in a rental car when the driver has the renter's permission to drive the car but is not listed as an authorized driver on the rental agreement.

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2015 U.S. Car Rental Market, AUTO RENTAL NEWS, http://www.autorentalnews.com/fileviewer/2229.aspx (last visited Oct. 28, 2017).....13

2016 U.S. Car Rental Market, AUTO RENTAL NEWS, http://www.autorentalnews.com/fileviewer/2451.aspx (last visited Oct. 28, 2017).....13

Consumer Information, FEDERAL TRADE COMMISSION, (Sept. 2012), https://www.consumer.ftc.gov/articles/0208-renting-car.....29

Fastbreak Service Terms and Conditions United States & Canada, BUDGET, (Apr. 28, 2017), https://www.budget.com/budgetWeb/html/en/terms/BudgetFastbreaktnc.pdf.....30

Rental Car Industry Expansion Into Neighborhoods to Meet Lifestyle and Transportation Needs, THE AUTO CHANNEL, (May 1 2005), http://www.theautochannel.com/news/2005/05/18/090459.html.....13

Rental Qualifications and Requirements, HERTZ, https://www.hertz.com/rentacar/reservation/reviewmodifycancel/templates/rentalTerms.jsp?KEYWORD=OPERATORS&EOAG=EWKC31 (last visited Oct. 22, 2017).....14

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INTEREST OF THE AMICI CURIAE[1]

Amici curiae respectfully submit this brief pursuant to Supreme Court Rule 37 in support of Petitioner. Norman M. Garland is a professor of law at Southwestern Law School. He teaches Evidence and Constitutional Criminal Procedure and has authored numerous publications on both Evidence and Criminal law. Michael M. Epstein is a professor of law and Director of the pro bono Amicus Project at Southwestern Law School. Amicus Lindsey N. Ursua is an upper-division J.D. candidate at Southwestern Law School with extensive academic and professional interest in Criminal Law and Procedure.

Amici have neither interest in any party to this litigation, nor do they have a stake in the outcome of this case other than their interest in the Court's interpretation people's constitutional right to privacy.

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[1] All parties have consented in writing to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. Southwestern Law School provides financial support for activities related to faculty members' research and scholarship, which helped defray the costs of preparing this brief. (The School is not a signatory to the brief, and the views expressed here are those of the *amici curiae*.) Otherwise, no person or entity other than the *amici curiae* or its counsel has made a monetary contribution intended to fund the preparation or submission of this brief.

SUMMARY OF THE ARGUMENT

For the past fifty years, the Court's precedents compel the conclusion that an unauthorized driver does have the capacity to assert Fourth Amendment protection. In order to maintain consistency in the Court's jurisprudence, this Court must find that a driver has a reasonable expectation of privacy in a rental vehicle even if he or she is not listed on the rental agreement.

Looking at the Court's jurisprudence, three reasons support the conclusion that an unauthorized driver has a reasonable expectation of privacy in a rental vehicle. First, the Court has long established that legal property rights are not a prerequisite for asserting Fourth Amendment protection. Rather, an individual may have the capacity to assert Fourth Amendment protection if the individual has an "interest that is recognized and permitted by society." An unauthorized driver has such interest because the driver is like an overnight guest in that the driver possesses the vehicle, has some measure of control over it, has the ability to exclude others except for the rental company and the authorized renter, and the unauthorized driver shares in the expectation of privacy of the authorized renter. Second, automobiles are vital to society. Third, the Court has recognized that an individual does not shed his or her constitutional right to privacy merely because the individual steps into an automobile.

The Court must not allow the people's constitutional rights to hinge on contractual agreements. The result would be to relegate Fourth Amendment jurisprudence to a subcategory of contract law which is contrary to what the founders intended in adopting the Fourth Amendment.

This Court must not permit such a result for four reasons. First, a bright line rule that automatically precludes an unauthorized driver from asserting Fourth Amendment protection conflicts with the Court's interpretation of what would constitute being "wrongfully on the premises." Moreover, if the Court reasons that an unauthorized driver's presence in the rental vehicle is wrongful, the Court would be equating civil liability with criminal liability. Second, courts have recognized that a breach of contract does not necessarily affect the rights of a third party. Thus, in such situations, the third party has a reasonable expectation of privacy. Third, such a bright line rule would contradict the Court's policy for Fourth Amendment violations because it would create rather than remove incentives for police officers to disregard the Constitution. Lastly, such a rule would lead to absurd results because the rule conflicts with what "society is prepared to accept as reasonable" and it would allow courts to arbitrarily allow an authorized driver who breaches the rental agreement, thereby becoming unauthorized, to assert Fourth Amendment protection while denying an unauthorized driver the same ability.

This Court should reverse the Third Circuit's decision. A finding that Mr. Byrd has a reasonable expectation of privacy in the rental vehicle even though he is not listed on the rental agreement maintains consistency in the Court's jurisprudence.

ARGUMENT

I. AN UNAUTHORIZED DRIVER HAS A REASONABLE EXPECTATION OF PRIVACY IN A RENTAL VEHICLE WHEN THE DRIVER HAS PERMISSION FROM THE AUTHORIZED RENTER TO OPERATE THE VEHICLE.

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." U.S. Const., amend. IV. The purpose of the Fourth Amendment is to "impose a standard of 'reasonableness' upon exercise of discretion by government officials, including law enforcement agents, in order 'to safeguard privacy and security of individuals against arbitrary invasion.'" *Delaware v. Prouse*, 440 U.S. 648, 653 (1979) (citing *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 312 (1978)).

Although the right to challenge a search on Fourth Amendment grounds historically has been referred to as "standing," the Court has opined that the concept is "more properly placed within the purview of substantive Fourth Amendment law than within that of standing." *Rakas v. Illinois*,

439 U.S. 128, 140 (1978). "Fourth Amendment rights are personal rights which, like other constitutional rights, may not be vicariously asserted." *Alderman v. United States*, 394 U.S. 165, 174 (1969). The ability to assert Fourth Amendment protection does not depend on property rights but upon whether the individual claiming protection has a "legitimate expectation of privacy in the invaded place." *Rakas*, 439 U.S. at 143 (quoting *Katz v. United States*, 389 U.S. 347, 353 (1967)). More specifically, the individual must have both a subjective expectation of privacy in the invaded place and a reasonable expectation of privacy. *Minnesota v. Carter*, 525 U.S. 83, 88 (1998).

This Court should not preclude Mr. Byrd from challenging the violation of his Fourth Amendment rights because he had a personal reasonable expectation of privacy in the rental vehicle even though he was not listed on the rental agreement. An unauthorized driver is similar to an overnight guest because the driver possesses the vehicle, has some measure of control over it, and shares in the expectation of privacy of the authorized renter. Privacy in a rental vehicle would certainly fall within the realm of expectations that society would recognize as reasonable because automobiles are essential to society. Moreover, an unauthorized driver does not shed his or her constitutional right to privacy merely because the driver steps into an automobile. Accordingly, this Court should find that an unauthorized driver has a personal reasonable

expectation of privacy in a rental vehicle. Thus, Mr. Byrd may claim Fourth Amendment protection.

A. An Unauthorized Driver Is Similar To An Overnight Guest.

The Third, Fourth, Fifth, and Tenth Circuit's reasoning that a person's reasonable expectation of privacy hinges on whether he or she has a legal property or possessory interest[2] directly contradicts the Court's well-established jurisprudence. The Court's jurisprudence supports the proposition that an unauthorized driver, like an overnight guest, has a personal legitimate expectation of privacy even though the unauthorized driver may not have a legal property right or possessory interest in the vehicle. An examination of *Rakas* and its progeny demonstrate that legal property rights or possessory interest is a mere factor and not a condition for a personal reasonable expectation of privacy. Moreover, even when property rights are considered, legal ownership of the property is not a prerequisite to the capacity to assert Fourth Amendment protection.

In *Rakas*, the Court reaffirmed the view adopted in *Jones v. United States* that "arcane distinctions developed in property law ought not to

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[2] *See United States v. Kennedy*, 638 F.3d 159 (3d Cir. 2011); *United States v. Wellons*, 32 F.3d 117 (4th Cir. 1994); *United States v. Roper*, 918 F.2d 885 (10th Cir. 1990); *United States v. Boruff*, 909 F.2d 111 (5th Cir. 1990).

control" the protection of the Fourth Amendment. *Rakas*, 439 U.S. at 143. The Court has held that while a personal reasonable expectation of privacy must have a source "outside of the Fourth Amendment," such expectation of privacy may be shown "either by reference to concepts of real or personal property law or to understandings or an interest that is recognized and permitted by society." *Carter*, 525 U.S. at 88 (quoting *Rakas*, 439 U.S. at 143 n.12).

The Court has emphasized the importance of "the everyday expectations of privacy that we all share" in defining reasonableness for the Fourth Amendment. *Minnesota v. Olson*, 495 U.S. 91, 98 (1990). The Court in *Rakas* relied more heavily on informal social concepts of "dominion," "control," and the right to exclude. *Rakas*, 439 U.S. at 148-49. Thus, the Court distinguished *Rakas*, where the passengers had no property or possessory interest in the vehicle, from cases involving possessory interests founded on understandings "recognized and permitted by society." *Rakas*, 439 U.S. at 143-49, n.12. The Court restated that people in public phone booths and social guests have no legal interest in the place searched, which they "neither ow[n] nor leas[e]," but those people have a reasonable expectation of privacy because they control the premises and can "exclude all others" except for the owner. *Rakas*, 439 U.S. 140-49 (citing *Katz*, 389 U.S. at 352; *Jones v. United States*, 362 U.S. 257 (1960)). Therefore, even if a defendant may not have a legal property or possessory interest in a place searched, he or she

may have an interest that is "recognized and permitted by society," which would create a legitimate expectation of privacy. *See Rakas*, 439 U.S. at 143.

In *Jones*, the Court rejected the government's argument that the defendant could not claim Fourth Amendment protection because he had "neither ownership of the seized articles nor an interest in the apartment greater than that of an 'invitee or guest.'" *Jones*, 362 U.S. at 259. The Court stated that the government's approach would draw distinctions among different types of possessors. *Id.* at 265. Possessors who are classified as a "guest" or "invitee" would have "too tenuous an interest although concededly having 'some measure of control' through their 'temporary presence.'" *Id.* at 265. Other possessors who have "'dominion of the apartment' or who are 'domiciled' there" have the capacity to assert Fourth Amendment protection. *Id.* at 265.

The Court found that the defendant's interest in his friend's apartment as a guest was legitimate enough for him to claim Fourth Amendment protection even though he did not have ownership in or a right to possess the premises. *Jones*, 362 U.S. at 365-66. The Court reasoned that the defendant was present in the apartment with the permission of the person who legally possessed the apartment and the defendant was given a key so he could access the apartment. *Id.* at 259-65. Thirty years later in *Minnesota v. Olson*, the Court reaffirmed the principle that a

guest or invitee may have the capacity to claim Fourth Amendment protection. *Olson*, 495 U.S. at 98.

In *Olson*, the Court found that the defendant, an overnight guest, had a personal legitimate expectation of privacy in his host's home because "a person may have a sufficient interest in a place other than his home to enable him to be free in that place from unreasonable searches and seizures." *Olson*, 495 U.S. at 98.

An unauthorized driver may have an interest in a rental vehicle that is "recognized and permitted by society" for three reasons. First, an unauthorized driver's control over an authorized driver's rental vehicle is comparable to the level of control that an overnight guest has over a host's home. In *Olson*, the Court stated that "when the host is away or asleep, the guest will have a measure of control over the premises." *Olson*, 495 U.S. at 99. Similarly, when an authorized driver gives express consent for an unauthorized driver to drive his or her rental vehicle, the unauthorized driver will have a measure of control over the vehicle. For example, the unauthorized driver can drive the vehicle to and from the driver's desired destinations.

Second, an unauthorized driver, like an overnight guest, has the ability to exclude others from an authorized driver's rental vehicle. *In Jones*, the defendant had the ability to exclude others, except the host, from the apartment. *Jones*,

362 U.S. at 265-67. Likewise, an unauthorized driver who has the consent of the authorized driver can exclude others, except the authorized driver or rental company, from the rental vehicle.

Third, an authorized driver may share his or her privacy in a rental vehicle with an unauthorized driver like a host who shares his or her privacy with an overnight guest. In *Olson*, the Court stated "[t]he houseguest is there with the permission of his host, who is willing to share his house and his privacy with his guest." *Olson*, 495 U.S. at 99. In the same way, an authorized driver who gives express consent for an unauthorized driver to drive the rental vehicle is also willing to share his or her privacy in the vehicle. For example, just as an overnight guest may be able to keep personal belongings in the host's home thus sharing the host's expectation of privacy in the home, an unauthorized driver can carry personal belongings in the vehicle with the shared expectation of privacy of the authorized driver.

Thus, the Court has found that individuals do have a personal reasonable expectation of privacy in situations like the case at bar. The Third, Fourth, Fifth, and Tenth Circuit's reasoning that an unauthorized driver does not have a reasonable expectation of privacy merely because the driver has no legal property right asks this Court to depart from fifty years of the Court's jurisprudence. Such departure is neither necessary nor warranted.

B. Automobiles Are Vital To Society.

Automobiles play an important role in society, and operators of such automobiles should have a recognized personal reasonable expectation of privacy within such vehicles. The Court has noted that a consideration in determining whether a person has a reasonable expectation of privacy is whether the activity in question serves functions recognized as valuable by society. *See Carter*, 525 U.S. at 89; *Olson*, 495 U.S. at 98-99. For example, the Court reasoned in *Olson* that overnight guests have a reasonable expectation of privacy in the host's home because such overnight visits are viewed as socially valuable. *Olson*, 495 U.S. at 98-99. The Court stated:

> Staying overnight in another's home is a longstanding social custom that serves functions recognized as valuable by society. We stay in others' homes when we travel to a strange city for business or pleasure, when we visit our parents, children, or more distant relatives out of town, when we are in between jobs or homes, or when we house-sit for a friend. We will all be hosts and we will all be guests many times in our lives. From either perspective, we think that society recognized that a houseguest has a legitimate expectation of privacy in a host's home.

Olson, 495 U.S. at 98.

The Fifth Circuit reiterated the social function analysis from *Olson* in *United States v. Smith*. 978 F.2d 171 (5th Cir. 1992). In *Smith*, the court noted that the reasonable expectation of privacy inquiry should consider what role the activity in question plays in society. *Id.* at 177. In *Smith*, the defendant sought to suppress evidence obtained from the interception of his wireless telephone conversations. *Id.* at 180. The court recognized the "vital role" the telephone plays in society and the expansion of wireless technology. *Id.* at 177 (quoting *Katz*, 389 U.S. at 352). The Fifth Circuit emphasized the importance of analyzing the social utility and society's reliance on the subject activity before stripping a person of his or her Fourth Amendment rights. *Id.* Thus, in determining whether a person's expectation of privacy is one that society recognizes as reasonable, the Court must consider whether the activity serves functions recognized as valuable by society. *Olson*, 495 U.S. at 98-99.

Automobiles in general are essential to society. According to the Bureau of Transportation, the automobile remains the most common means of transportation to work.[3] More specifically, in 2015 126,924 people, making up just

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[3] *Table 1-41: Principal Means of Transportation to Work (Thousands)*, BEAU OF TRANSPORTATION STATISTICS, https://www.rita.dot.gov/bts/sites/rita.dot.gov.bts/files/publications/national_transportation_statistics/html/table_01_41.html (last visited Oct. 28, 2017).

above eighty-five percent of the individuals surveyed, reported using automobiles to commute to work.[4]

Rental cars are both commonly used and vital to society. In 2016, there were 2,313,027 rental cars reported in service, which is over a hundred and thirty thousand more than in 2015.[5] A 2005 poll indicated that one-third of drivers twenty-five years of age or older often need an additional vehicle than their primary car and are "more likely to rent a vehicle."[6] For example, a person might need a larger vehicle to move furniture and belongings or to simply carpool with family and friends to a desired destination. Also, a person might need a rental car if his or her personal vehicle is being repaired.

Like staying overnight at a host's home, the use of a rental car is an activity that serves functions recognized as valuable by society and the fact that a driver is unauthorized should not change this reasoning. Courts recognize that the

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[4] *Id.*

[5] ***2016 U.S. Car Rental Market***, AUTO RENTAL NEWS, http://www.autorentalnews.com/fileviewer/2451.aspx (last visited Oct. 28, 2017); ***2015 U.S. Car Rental Market***, AUTO RENTAL NEWS, http://www.autorentalnews.com/fileviewer/2229.aspx (last visited Oct. 28, 2017).

[6] ***Rental Car Industry Expansion into Neighborhoods to Meet Lifestyle and Transportation Needs***, THE AUTO CHANNEL, (May 1 2005), http://www.theautochannel.com/news/2005/05/18/090459.html.

use of rental cars by unauthorized drivers is a common practice in today's society. *See Roth v. Old Republic Ins.*, 269 So. 2d 3, 6-7 (Fla. 1972); *Thrifty Car Rental, Inc. v. Crowley*, 677 N.Y.S.2d 457, 459 (Sup. Ct. Albany Co. 1998); *Motor Vehicle Acc. Indemn. Corp. v. Cont'l Nat. Am. Group Co.*, 35 N.Y.2d 260, 264-65 (1974). The Supreme Court of Florida noted that unauthorized drivers operating rental cars is "[i]n the very nature of modern automobile use." *Roth*, 269 So. 2d at 6-7. Such practice is both "foreseeable", *Id.*, and its widespread presence is "exceedingly great." *Motor*, 35 N.Y.2d at 264-65. *See also Thrifty*, 677 N.Y.S.2d at 459 (noting that unauthorized drivers' use of rental cars is a "common scenario").

Rental cars are driven by unauthorized drivers for various reasons. For example, an authorized driver may become sick or injured and be unable to drive the vehicle, so an unauthorized driver may have to drive the rental car. Often the additional drivers must be present to sign the rental agreement, must present an acceptable credit or debit card in their own name, and pay an additional daily fee.[7] Jumping through such hoops may not be practical or even possible at the time. Finally, while some rental companies allow an authorized driver's spouse to operate the vehicle,[8]

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[7] *See Rental Qualifications and Requirements*, HERTZ, https://www.hertz.com/rentacar/reservation/reviewmodifycancel/templates/rentalTerms.jsp?KEYWORD=OPERATORS&EOAG=EWKC31 (last visited Oct. 22, 2017).

[8] *See Id.*

some unmarried authorized drivers may allow their unauthorized significant others to operate the vehicle. These examples are only a few of the various circumstances where an unauthorized driver would operate a rental vehicle. The fact that the driver is unauthorized should not negate the driver's personal reasonable expectation of privacy.

C. Drivers Must Not Be Precluded From Claiming Fourth Amendment Protection Merely Because The Place Searched Was An Automobile.

While it is undisputed that the home is entitled to "special protection as the center of the private lives of our people," *Carter*, 525 U.S. at 99, the court has repeatedly held that a person may have a reasonable expectation of privacy in places other than the person's own home. *See Olson*, 495 U.S. 91 (holding that an overnight guest has a reasonable expectation of privacy in the host's home); *see also United States v. Jones*, 565 U.S. 400 (2012); *O'Connor v. Ortega*, 480 U.S. 709 (1987).

In *O'Connor*, the Court found that a public employee had a reasonable expectation of privacy in his office. *O'Connor*, 480 U.S. at 718. The Court focused on whether the public employee's expectation of privacy in his desk and file cabinets was one that society would consider reasonable. *Id.* at 715-18. The Court reasoned, in part, that even though an office is seldom private and free from entry by others, an employee may keep personal items in the office. *Id.* at 716-18. Thus, the

defendant's expectation of privacy was one that society would recognize as reasonable. *Id.* at 18.

In the automobile context, the driver does not lose all reasonable expectation of privacy merely because the automobile is subject to government regulation. *Prouse*, 440 U.S. at 662. As the Court noted in *Terry v. Ohio*, people are not stripped of Fourth Amendment protection when they walk out of their homes onto public sidewalks. 392 U.S. 1 (1968). "Nor are they shorn of those interests when they step from the sidewalks into their automobiles." *Prouse*, 440 U.S. at 663.

Recently, the Court reaffirmed a person's reasonable expectation of privacy in the automobile context in *Jones*, 565 U.S. 400. The Court found that a person has a reasonable expectation of privacy on the underbody of a vehicle. *Id.*

In *Prouse*, the Court emphasized that a person does not shed his or her constitutional right to privacy when he or she steps into an automobile. *Prouse*, 440 U.S. at 662-63. In affirming this principle, the Court reasoned that automobile travel is a common and often necessary mode of transportation to and from work, home, and other activities. *Id.* at 662. Moreover, people often spend more hours each day traveling in automobiles than walking on the streets. *Id.* at 662. Indisputably, many people experience a greater sense of security and privacy in traveling in an automobile than they do in exposing themselves by other modes of transportation. *Id.* at 662. "Were the individual

subject to unfettered governmental intrusion every time he entered an automobile, the security guaranteed by the Fourth Amendment would be seriously circumscribed." *Id.* at 662-63. Thus, this Court must not strip a driver of his or her Fourth Amendment protection merely because the invaded place was an automobile.

II. PEOPLE'S CONSTITUTIONAL RIGHTS MUST NOT HINGE ON CONTRACTUAL AGREEMENTS.

Rather than staying true to the Court's precedent focusing on what "society is prepared to recognize as 'reasonable,'" the Third Circuit's approach relegates Fourth Amendment jurisprudence to a subcategory of contract law. This is contrary to what the founders intended in adopting the Fourth Amendment. *See* U.S. Const., amend. IV. Undoubtedly, the text of the Fourth Amendment lacks any assertion that people's privacy rights are subject to contractual agreements. *Id.* Essentially, the Third Circuit's approach places contract law above the core constitutional rights established in the Fourth Amendment. The Third Circuit seeks to strip the basic rights under the Fourth Amendment from not only the petitioner, but countless future drivers only because the driver is not listed on the rental agreement. The Supreme Court should not permit such a result.

This Court must not adopt a bright line rule leaving unauthorized drivers vulnerable to

invasive and unlawful searches and seizures with no ability to claim Fourth Amendment protection merely because there may be a breach of the rental agreement for four reasons. First, such a bright line rule would conflict with the Court's Fourth Amendment jurisprudence. Second, courts have recognized that a breach of contract does not affect the rights of a third party. Third, adopting such a bright line rule would create rather than remove an incentive for police officers to disregard the Constitution. Finally, such a bright line rule is illogical.

A. A Bright Line Rule That Prevents Unauthorized Drivers From Challenging Fourth Amendment Violations Because Of Contractual Agreements Conflicts With This Court's Jurisprudence.

People's constitutional right to privacy must not rest on contractual agreements. Such a holding would conflict with the Court's Fourth Amendment precedent. In *Jones*, decided by the Court in 1960, Justice Frankfurter, writing for the majority, noted that a person who is "wrongfully on the premises" would not have the ability to assert Fourth Amendment protection. 362 U.S. at 267. Likewise, in *Rakas*, Justice Rehnquist affirmed this statement stating that "one wrongfully on the premises could not move to suppress evidence obtained as a result of searching them." 439 U.S. at 141. Thus, the question is whether an unauthorized driver is "wrongfully on the premises."

In *Rakas*, Justice Rehnquist disagreed with some lower courts that had held that a defendant in a stolen car had a reasonable expectation of privacy. *Rakas*, 439 U.S. at 141 n.9. Thus, the Court indicated that the term "wrongfully on the premises" may mean "illegal" or "unlawful." *Id.* at 141. The Court explained that an example of "wrongful" may be *criminal* violations such as a stolen car, not necessarily violations of *private* law. *See Rakas*, 439 U.S. at 141 n.9 (emphasis added). Moreover, the Court further elaborated that a burglar who is storing stolen goods in a cabin may have a justified subjective expectation of privacy, but not one that the law would recognize as "legitimate" because the burglar's presence is "wrongful." *Rakas*, 439 U.S. at 143 n.12. The Sixth and Ninth circuits have discussed whether an unauthorized driver is illegally or unlawfully in the rental vehicle for purposes of Fourth Amendment protection.

In *United States v. Smith*, the Sixth Circuit noted that it was not illegal for the defendant, an unauthorized driver, to possess or control the rental vehicle even though he was not named as an authorized driver on the rental agreement. 263 F.3d 571, 587 (6th Cir. 2001). The court stated:

> Although Smith's use of the vehicle was clearly a breach of the agreement with Alamo, it does not follow that he has no standing to challenge the search. It was not *illegal* for Smith to possess or drive

> the vehicle, it was simply a breach of the contract with rental company.

Id. at 587 (italics in original).

Likewise, in *United States v. Thomas*, the Ninth Circuit noted that an unauthorized driver, who has consent to drive the rental vehicle from an authorized driver, has a legal right to exclude others from the vehicle, even if his or her use of the vehicle breaches the terms of the rental agreement between the authorized driver and the rental company. 447 F.3d 1191, 1198-99 (9th Cir 2006).

Constitutional protections cannot and should not hinge on contractual provisions. The Court has implicitly defined "wrongfully on the premises" as illegally or unlawfully. *Rakas*, 439 U.S. at 141. As the Sixth and Ninth Circuits have emphasized, a driver is not illegally or unlawfully possessing the vehicle simply because the driver is not listed as an authorized driver on the rental agreement. Courts that have held that an unauthorized driver does not have a reasonable expectation of privacy in a rental vehicle focused on the violation of the terms of the rental agreement and property rights. *See Kennedy*, 638 F.3d at 159; *United States v. Riazco*, 91 F.3d 752 (5th Cir. 1996); *United States v. Obregon*, 748 F.2d 1371 (10th Cir. 1984). However, those courts fail to address this seemingly clear conflict that conduct that may give rise to civil liability, possibly due to a breach of contract, does not equal criminal liability.

Although the unauthorized driver's use of the vehicle may be a breach of the rental agreement giving rise to potential civil liability for the renter or authorized driver, the Court must not equate civil liability with criminal liability. Applying the Court's jurisprudence and the Sixth and Ninth Circuit's rationale, an unauthorized driver's use of the vehicle should not pass the threshold of "illegal or unlawful." To hold otherwise would conflate standards of liability that are polar opposites. Thus, the Court should not allow people's Fourth Amendment rights to depend on contractual terms or breaches thereof.

B. Courts Have Recognized That A Breach Of Contract Does Not Affect The Rights Of A Third Party.

Courts have recognized that a third party's rights are not necessarily affected when there is a breach of contract between the original parties. *See generally Kleyle v. Deogracias*, 195 So.3d 234 (Miss. Ct. App. 2016); *Young v. District of Columbia*, 752 A.2d 138 (D.C. 2000). Especially, the context of subleasing and assignment expands on this principle. The *Code of Federal Regulations* defines a sublease as "a transfer of a non-record title interest in a lease, i.e., a transfer of operating rights." 43 C.F.R. 3100.0-5(e) (2014). An assignment is defined as a "transfer of all or a portion of the lessee's record title interest in a lease." *Id.* At common law, the general rule is that, in the absence of an express restriction, a tenant for a definite term has an unrestricted right to

assign or sublet at will. *Kruger v. Page Management Co., Inc.*, 432 N.Y.S.2d 295, 299 (App. Div. 1980). Furthermore, "provisions or covenants in a lease restricting assignment or subletting are 'restraints which courts do not favor.'" *Id.* at 300 (citing *Riggs v. Pursell*, 66 NY 193, 201 (1876); *Presby v. Benjamin*, 169 NY 377, 380 (1902)). The reason is such are restraints on free alienation. *Id.* at 300.

Even if the agreement between the landlord and the tenant prohibits assigning or subleasing, the tenant can still choose to do so. However, the landlord may be able to sue the original tenant for breach and recover damages. *Weisman v. Clark*, 232 Cal.App.2d 764, 768 (1965); *Food Pantry, Ltd. v. Waikiki Bus. Plaza, Inc.*, 58 Haw. 606, 615 (1978); *Theatre Row Phase II Assocs. v. Nat'l Recording Studios, Inc.*, 739 N.Y.S.2d 671 (2002). Some courts have found in such scenarios that the restriction on subleasing or assigning with or without the landlord's consent does not automatically void the sublease or assignment. *See Webster v. Nichols*, 104 Ill. 160, 171 (1882) (stating that a clause in the lease prohibiting assignment without the written consent of the lessors does not render the assignment absolutely void but merely voidable at the option of the lessors or their representatives); *Eldredge v. Bell*, 64 Iowa 125, 130 (1884) (stating that a violation of a prohibition on assignment does not cause forfeiture in the absence of any declaration of forfeiture); *Weisman*, 232 Cal.App.2d at 768 (noting that an assignment in violation of a prohibition on assigning remains

valid until the landlord elects to take action based on the breach); *see also Young*, 752 A.2d 138 (noting that "[r]estrictions in original lease against subletting do not affect, as between lessee and sublessee, the validity of the sublease"); *Kleyle*, 195 So.3d 234 (breach of landlord consent provision in the lease did not excuse subtenant from paying rent due under sublease).

According to the Sixth and Ninth Circuits, when there is a breach of the prohibition on subleasing or assigning in a lease between the landlord and the original tenant, the third-party subtenant may still have a reasonable expectation of privacy in the place subleased or assigned. *United States v. McClendon*, 86 Fed. Appx. 92, 93-96 (6th Cir. 2004); *Khlee v. United States*, 53 F.2d 58 (9th Cir. 1931). In *McClendon*, the tenant of an apartment was the only person authorized to live at the residence. However, the tenant sublet the bedroom of the apartment to the defendant. Even though the defendant was not authorized to live in the bedroom by the landlord, the Sixth Circuit found that the defendant had a reasonable expectation of privacy in the bedroom. The court expressly rejected the government's argument that the defendant had no expectation of privacy in the bedroom because the terms of the tenant's lease prohibited subletting. The court stated that the tenant's "violation of her lease in subletting the bedroom to McClendon did not deprive McClendon of a reasonable expectation of privacy in what was admittedly his residence." *McClendon*, 86 Fed. Appx. at 95. The court also reasoned that while the

sublease may have violated the rental agreement with the housing authority, the government cited no authority indicating that that breach of contract takes away the defendant's expectation of privacy. Hence, the defendant's motion to suppress was properly granted by the trial court.

In *Khlee*, the Ninth Circuit found that the defendants had a reasonable expectation of privacy in the place the defendants sublet even though the sublease was a breach of the prohibition on subleasing or assigning without consent. The court reasoned that there was no showing that the owner or the original tenant had made any demand upon the defendants to vacate the premises. Thus, the defendants were under a "color of right" and their presence in the property did not amount to trespass. *Khlee*, 53 F.2d at 61.

The Court has never allowed contract law to take precedent over people's constitutional rights. Now is not the time, nor will there ever be a time, to allow the Constitution to be so diminished. While the cases addressed above relate to real property as opposed to automobiles, the concept that a breach of a rental agreement should not affect the rights of a third party is applicable to the case at bar. This Court should not allow a breach of contract between an authorized driver and the rental company to affect the constitutional rights of the third party unauthorized driver.

C. A Rule That Strips A Driver Of His Or Her Constitutional Right To Privacy Merely Because The Driver Is Not Named On The Rental Agreement Would Contradict This Court's Own Fourth Amendment Doctrine.

The Court is charged with the duty to uphold the purpose of the Fourth Amendment. *Mapp v. Ohio*, 367 U.S. 643, 657 (1961). Such purpose is evident from the text itself: "[t]he right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated . . . ." U.S. Const., amend. IV. Over a century ago, the Court established a remedy for Fourth Amendment violations. *Weeks v. United States*, 232 U.S. 383 (1914). The Court unanimously agreed that allowing evidence, obtained unlawfully, to be admitted would "affirm by judicial decision a manifest neglect if not an open defiance of the prohibitions of the Constitution." *Weeks*, 232 U.S. at 394. Thus, the exclusionary rule was created to "effectuate the guarantees of the Fourth Amendment." *United States v. Calandra*, 414 U.S. 338, 347 (1974).

Nearly fifty years later, Justice Clark, writing for the majority in *Mapp v. Ohio*, emphasized that the "purpose of the exclusionary rule 'is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it.'" *Mapp*, 367 U.S. at 656 (quoting *Elkins v. United States*, 364 U.S. 206, 217 (1960)).

A rule that completely strips a driver of his or her Fourth Amendment protections based on the terms of a rental agreement would *create* an incentive for police to disregard the Constitution. Such a rule "seriously undervalues the privacy interests at stake" and triggers the concerns expressed by the Court in *Arizona v. Gant*. 556 U.S. 332, 345 (2009). In *Gant*, the Court addressed whether a vehicle must be within the arrestee's reach to validate a search incident to the arrest. *Id.* at 342. The Court rejected a broad reading of *New York v. Belton*, 453 U.S. 454 (1981), which would create a bright line rule allowing searches incident to arrests even if the arrestee is not within reaching distance of the vehicle, for several reasons. *Id.* at 343. The Court explained:

> A rule that gives police the power to conduct such a search whenever an individual is caught committing a traffic offense, when there is no basis for believing the evidence of the offense might be found in the vehicle, creates a serious and recurring threat to the privacy of countless individuals. Indeed, the character of that threat implicates the central concern underlying the Fourth Amendment—the concern about giving police officers unbridled discretion to rummage at will among a person's private effects.

Id. at 345.

The Supreme Court must not adopt a rule that contradicts the Court's own policy of removing rather than creating incentives to disregard the Constitution. Just as the Court expressly rejected a rule giving police the ability to search a vehicle whenever the driver is caught committing a traffic offense, this Court must reject a bright line rule that gives police officers the ability to search a rental vehicle whenever officers discover a breach of the rental agreement. Such a bright line rule that prevents an unauthorized driver from challenging Fourth Amendment violations gives police officers an automatic loophole to the exclusionary rule because the unauthorized driver would be unable to claim Fourth Amendment protection. Essentially, such a rule would give police "limitless discretion to conduct exploratory searches" whenever officers identify a breach of a rental agreement. *Gant*, 556 U.S. at 345 n.5. In such situations, the police officer needs no basis for believing that evidence of an offense might be found in the car because the rule would allow the officer to "rummage at will" in hopes of finding evidence. *Id.* The Court must not adopt a bright line rule that threatens to subject unauthorized drivers to arbitrary invasions of privacy.

D. The Third Circuit's Approach Would Lead To Absurd Results.

The Court has always consciously sought to avoid unworkable rules. *See Gant*, 556 U.S. 332; *Planned Parenthood v. Casey*, 505 U.S. 833 (1992); *Swift & Co. v. Wickham*, 382 U.S. 111 (1965). In fact, the Court may overrule its own precedent if the precedent proves to be unworkable. *Payne v. Tennessee*, 501 U.S. 808, 827 (1991). The Third Circuit asks this Court to adopt a rule that would yield illogical results because the rule conflicts with expectations that society would consider reasonable. The rule also fails to distinguish between unauthorized drivers and authorized drivers that breach the rental agreement. The Court must not adopt a rule that would result in absurd dispositions.

1. The Third Circuit's Approach Conflicts With What "Society Is Prepared To Accept As Reasonable."

The Court must look beyond the four corners of the rental contract when determining what "society is prepared to accept as reasonable." An unauthorized driver does have a personal reasonable expectation of privacy in a rental vehicle because such expectation falls squarely within what society would recognize as reasonable. Automobiles are valuable to society. Rental cars in general, even if driven by unauthorized drivers, are both valuable and common. Although an unauthorized driver's use of a rental vehicle may

be without the rental company's permission, the inquiry is not whether allowing such conduct would go against the wishes of the rental company, the inquiry is whether the unauthorized driver's expectation of privacy falls within what society would recognize as reasonable. The answer is clearly yes.

The terms of an adhesion contract must not be a proxy for what "society is prepared to accept as reasonable" because such contracts conflict with what society would permit. A rental agreement is a strict adhesion contract because it is a standardized contract, drafted by the rental company, that is offered on a take-it-or-leave-it basis. *See Strand v. U.S. Bank Nat. Ass'n ND*, 693 N.W. 2d 918, 924 (N.D. 2005). Take-it-or-leave-it contracts may prohibit conduct that society accepts as reasonable and are inconsistent with societal expectations of reasonableness. For example, rather than being consistent with expectations that society would recognize as reasonable, contractual requirements that every driver be an "authorized" driver may be the company's attempt to limit insurance exposure and to accrue additional profit.[9] Because an adhesion contract conflicts with expectations that society would recognize as reasonable, it cannot be the basis for determining who has a reasonable expectation of privacy.

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[9] *See Consumer Information*, FEDERAL TRADE COMMISSION, (Sept. 2012), https://www.consumer.ftc.gov/articles/0208-renting-car (warning consumers to look out for "[a]dditional-[d]river fees").

2. If A Driver Of A Rental Vehicle Has No Reasonable Expectation Of Privacy Merely Because The Driver Is Unauthorized, Then Many Originally Authorized Drivers Lack A Reasonable Expectation Of Privacy.

If the Court focuses on the rental contract in determining whether a driver has a reasonable expectation of privacy, even drivers that are authorized by the contract itself may not have the ability to claim Fourth Amendment protection. The result of focusing on the rental contract would be to eliminate an authorized driver's reasonable expectation of privacy in the rental vehicle when the driver breaches the terms of the agreement.[10]

Take-it-or-leave-it contracts, such as the ones used by rental companies, are easily breached by authorized drivers. For example, allowing another person to drive the car, driving on unpaved roads, fueling the car with the wrong gas, and having too many people in the vehicle can automatically cause the authorized driver to be in breach of the agreement.[11]

Permitting an authorized driver, who becomes unauthorized by breaching the rental

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[10] *See Fastbreak Service Terms and Conditions United States & Canada*, BUDGET, (Apr. 28, 2017), https://www.budget.com/budgetWeb/html/en/terms/BudgetFastbreaktnc.pdf.

[11] *Id.*; *see also Standard Terms and Conditions of Rental*, HERTZ, https://images.hertz.com/pdfs/RT_FULL_HR_EN.pdf (last visited Oct. 21, 2017).

agreement, to assert Fourth Amendment protection while preventing an unauthorized driver from doing the same, creates a conflict. Courts have explicitly indicated that an authorized driver has a reasonable expectation of privacy in a rental car. *See United States v. Walton*, 763 F.3d 655 (7th Cir. 2014); *Kennedy*, 638 F.3d 159 (emphasizing an authorized driver's property interest); *United States v. Walker*, 237 F.3d 845 (7th Cir. 2001). Moreover, even when the driver breaches the agreement with the rental company, he or she has a reasonable expectation of privacy. *United States v. Walton*, 763 F.3d 655 (7th Cir. 2014). In *United States v. Cooper*, the Eleventh Circuit held that the authorized driver did not lose his expectation of privacy in the rental vehicle even though the vehicle was four days overdue. 133 F.3d 1394 (11th Cir. 1998). The court stated that the driver's "failure to call Budget to extend the due date four days may have subjected him to civil liability, but it should not foreclose his ability to raise a Fourth Amendment challenge to the officers' search of the rental car in a criminal proceeding." *Id.* at 1402. Likewise, in *United States v. Henderson*, the Ninth Circuit held that an authorized driver has a reasonable expectation of privacy in a rental car even after the lease expires and he or she breaches the rental agreement. 241 F.3d 638 (9th Cir. 2000).

The Third Circuit's approach asks this Court to distinguish between two types of drivers: (1) an authorized driver who breaches the rental agreement and becomes an unauthorized driver

and (2) an unauthorized driver who has permission from the authorized driver to use the rental car. The problem is that the Third Circuit's approach asks this Court to arbitrarily allow the former to assert Fourth Amendment protection while the latter is left without the ability to challenge unlawful police misconduct. Because an authorized driver can so easily breach the agreement and lose his or her right to operate the vehicle, thereby becoming an unauthorized driver, this result is absurd. Arbitrarily distinguishing between the two drivers is simply confusing and illogical. The only difference between the two drivers is that the former is listed on the rental agreement. The ending of both scenarios is the same, both drivers are unauthorized yet only one has a reasonable expectation of privacy. The Supreme Court should not allow other courts to utilize this confusing and unworkable approach, especially when people's constitutional rights are at stake.

CONCLUSION

This Court should reverse the Third Circuit's ruling that an unauthorized driver does not have a reasonable expectation of privacy in a rental vehicle. While the unauthorized driver may not retain a legal property or contractual right in the rental vehicle, the unauthorized driver should retain his or her ability to assert constitutional protection.

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